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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 630.

THE BARRETT LINE, INC., *Appellant,*

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellees.*

On Appeal from the District Court of the United States for
the Southern District of Ohio.

BRIEF ON BEHALF OF AMERICAN BARGE LINE
COMPANY, UNION BARGE LINE CORPORATION,
MISSISSIPPI VALLEY BARGE LINE COMPANY,
AND CAMPBELL TRANSPORTATION COMPANY,
INTERVENORS.

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March, 1945.

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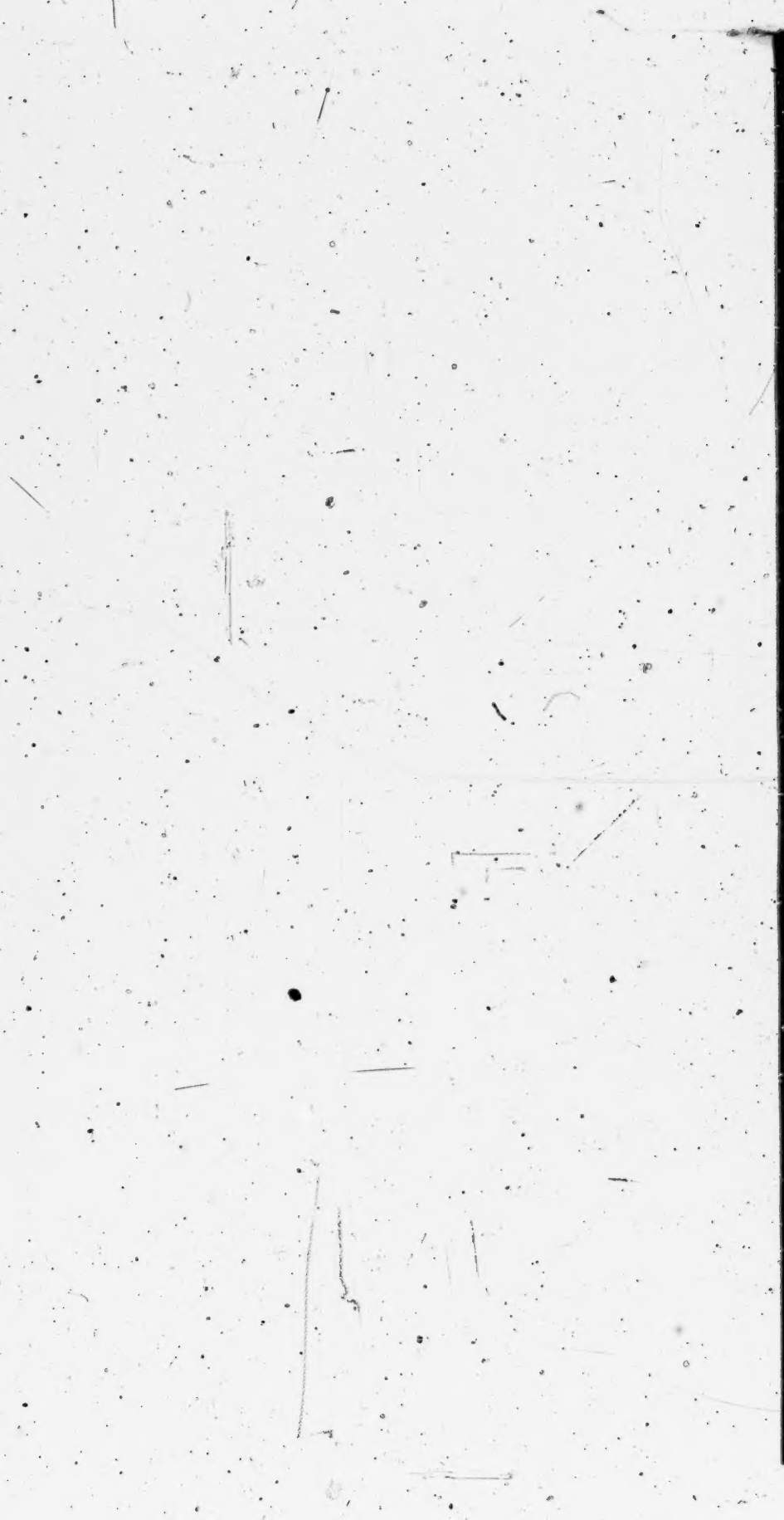
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MISSISSIPPI VALLEY BARGE LINE COMPANY,
AND CAMPBELL TRANSPORTATION COMPANY,
INTERVENORS.**

JURISDICTION.

The final decree of the three-judge district court was entered on July 28, 1944 (R. 29). Petition for appeal was presented and allowed on September 15, 1944 (R. 30-33). This court entered its order noting probable jurisdiction December 4, 1944 (R. 149).

STATUS OF INTERVENORS AND THEIR INTEREST IN THE SUBJECT MATTER IN DISPUTE.

Intervenors American Barge Line Company, Union Barge Line Corporation, Mississippi Valley Barge Line Company, and Campbell Transportation Company are all common carriers by water operating on certain sections of the Ohio and Mississippi Rivers and tributaries thereof.

Intervenors, and each of them, would be in competition with plaintiff on a substantial portion of the waterway system on which operating rights are sought. Union Barge Line Corporation, Mississippi Valley Barge Line Company, and Campbell Transportation Company intervened in and have been parties to the proceeding before the Commission from its inception and are entitled "as of right" to participate in this suit.

American Barge Line Company intervened in the proceeding before the Commission for the purpose of filing exceptions to the proposed report of the Examiner and participating in oral argument. Its request for intervention was granted by the Commission; it filed its Exceptions and participated in the oral argument.

The position of American Barge Line Company, and its competitive relation with respect to the operating authority sought by plaintiff is precisely the same as, if indeed not greater in intensity and scope, than that of its co-intervenors, in that it operates on a greater number of waterways which would be competitive with the applicant.

STATUTES INVOLVED.

The statutes directly involved are sections 302(e), 303(b), 303(d), 309(f) and 309(g) and these, with the exception of section 303(d), are reproduced in full in the appendix of appellants Brief herein. Other sections will be referred to as may be necessary in treating the issue.

THE PROCEEDINGS BEFORE THE COMMISSION.

This is an application under the Interstate Commerce Act of 1940, for (a) permit to continue operations as a contract carrier on the Ohio and Mississippi Rivers and all tributaries thereof, under the so-called "grandfather" clause; (b) an application for authority as for a "new" operation over the waterways described; and (c) an application for authority to continue operations as a contract carrier in the "furnishing of vessels."

In respect of the application under the "grandfather" clause the Commission found:

An exhibit of record contains a description of all services performed between January 1, 1936, and August 11, 1942. During this period practically all services performed were such that they may be continued *without any authorization from us* because they are *not subject to regulation under part III of the act*. Stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling were the only commodities carried. Practically all of the stone was transported for the United States Army Engineers between points in Missouri, Illinois, Kentucky, Arkansas, and Tennessee and was used for construction work on the waterways. The transportation of bulk commodities is exempt from regulation under section 303 (b). There were 7 movements of petroleum products in 1937 from Baton Rouge, La., to Louisville, Ky.; 3 movements in 1941, 1 from Vicksburg, Miss., to Grand Tower, Ill., 1 from Cairo to Alton, Ill., and 1 from Wycliff, Ky., to Nashville, Tenn.; and 8 movements in 1942 from points in Louisiana to Midland, Pa., North Bend, Ohio, and Memphis, Tenn. The transportation of petroleum, in bulk, is exempt under the provisions of section 303 (b) or (d). One shipment of fabricated steel and piling was handled in 1936 from Cairo to Genoa, Wis. *There has been none since*. In one instance a contractor's fleet of work boats was moved which operation was probably exempt by our order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.

Applicant maintains that owing to the varying and sporadic nature of its operation it is impossible to

select any limited period of its existence as representative of its business. It claims to have handled a variety of commodities in the past, such as scrap iron, pig iron, fabricated iron and steel, ties, pipe, sulphur, coal, logs, lumber, salt, grain, sand, gravel, cement, paving blocks, automobiles, and bauxite ore, and seeks authority to handle commodities generally so that it will be in a position to again handle these or or similar commodities should the occasion arise.

Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act. (Italics ours.)

In respect of the application as for "new" operating rights the Commission found:

Applicant, however, is *not proposing any new operation*. In fact, most of its equipment at present is being used in the transportation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. *No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of trans-*

portation subject to the act. On this record we conclude that applicant *has failed to show that it is proposing any new operation*, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation. (Italics ours).

In respect of the application for rights as a "furnisher of vessels" the Commission found:

Other services rendered during the period in question consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or to shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning operations. Of the foregoing the only transportation which might be subject to regulation under part III was that of chartering vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on ~~January 1, 1940~~, and continuously since, was engaged in chartering operations subject to part III of the act.

THE RANGE OF JUDICIAL REVIEW OF AN ORDER OF THE COMMISSION.

As pointed out in *Rochester Telephone Corp. v. United States*, 307 U.S. 125 at 139, 140:

Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestable. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission v. Union P. R. Co.*, 222 U.S. 541.

ARGUMENT.

I.

There Was a Rational Basis For the Findings of the Commission.

The "grandfather" clause.

Under the "grandfather" clause (Section 309 (f)) the Commission was bound to deny the application if, on the critical date—January 1, 1940—and continuously since, the applicant had not been in bona fide operation in connection with the transportation of commodities made subject to regulation. In this case it found from the applicant's own exhibit (R. 118-126) covering its entire operations for the period from 1936 to 1942, inclusive, that it had engaged in but one movement of a regulated commodity¹ and as to that it properly found that:

One shipment made in 1936 and others at an indefinite period prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. (Italics ours.)

On behalf of applicant it is urged that since the definition of a contract carrier in section 302 (e) of the act² contains

¹Fabricated steel in 1936 (R. 119).

²"Sec. 302 (e). The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in the transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

no mention of exempted transportation (or commodities) a permit must be issued under the "grandfather" clause if an applicant was functioning as a contract carrier irrespective of the question whether on the critical date it was handling transportation (commodities) subject to the act.

This contention, if sustained, would have the effect of reading the exemption provisions out of the act.

When Congress enacted the Interstate Commerce Act of 1940, it took pains to exempt from all regulation (and hence from the jurisdiction of the Commission) certain commodities or activities. In par. (b) of section 303 it exempted commodities handled in bulk;³ in par. (c) it exempted bulk commodities handled on the Great Lakes; in par. (d) it exempted liquid commodities in bulk in tank vessels; in par. (e) it exempted certain transportation if and when the Commission should find that such transportation "by reason of its inherent nature", etc, is not substantially competitive with transportation performed by common carriers under Parts I, II, or III of the act; in par. (f) it exempted certain services such as towage when performed by an agent under arrangement with the principal carrier; in par. (g) it exempted transportation within harbor limits and in small craft; in par. (h) it exempted private carriage under the conditions stated; in par. (j) it saved to the States exclusive jurisdiction over intrastate transportation.

The exemptions relating to commodities were all prefaced by the statement that "Nothing in this part shall apply to . . ." and the jurisdictional character of the exemptions was carefully explained by Representative Bulwinkle, one of the sponsors of the Bill, during the debates in the House. At p. 13612, Congressional Record, July 22, 1939, this statement appears:

"Subsections (b) and (c) are unqualified exemptions, and the carriers exempted are not required to apply to the Commission for exemption. These exemptions are written in terms of the transportation engaged in, so

³The exemptions are quoted in full in the Appendix hereto.

that *any other transportation* which the carriers may engage in will be subject to such regulation as may be provided for: (Italics ours).

In the light of these specific exemptions the Commission would commit a vain act if it were to grant a permit on a showing that an applicant, on the critical date, had performed nothing save transportation exempted from all regulation. In *Upper Mississippi Towing Corp., Application*, 260 I. C. C. 292, the entire Commission, on reconsideration, affirmed the denial by Division 4 of a certificate of public convenience and necessity under the "grandfather" clause on the ground that the applicant therein, on the critical date, had performed nothing but exempt transportation. At p. 293 of its opinion the Commission stated:

The purpose of the "grandfather" clause was to assure those to whom Congress had extended its benefit a substantial parity between future operations and prior bona fide operations; *Alton R. Co. v. United States*, 315 U. S. 15. With this guide before it, the division might have found that applicant was a common carrier of liquid cargoes, in bulk, in tank vessels, and as a towage in the performance of towage for other water carriers, subject to part III. That would have availed applicant nothing; however, as no certificate *could be issued* to authorize such activities because the provisions of part III *do not apply* to transportation services of those types, by reason of the exemptions in section 303(b), (d) and (f) (2). (Italics ours.)

Of similar import are its decisions in *McCarren Towing Line Application*, 250 I. C. C. 168, 169; *Ralph Raiké Applications*, 250 I. C. C. 177, 178; *Bronx Towing Line, Inc.*, 250 I. C. C. 614, 615; *Canal Lakes Towing Corporation*, 250 I. C. C. 621, 625, 626; *Eddie Erlbacher Application*, (Mimeo-graphed report of November 3, 1942—not printed) and many others.

A decision of the Commission if based on substantial evidence and made within the framework of the statute is binding upon the Courts. As pointed out in *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 481:

As we indicated in *Alton R. Co. v. United States*, supra, the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior bona fide operations." We cannot say that that was denied in this case, if the limitations on the territorial scope of the operations are alone considered. While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service. And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not true in this case.

In the denial of a permit to an applicant who performed nothing save exempted transportation on the critical date the "substantial parity between future operations and prior bona fide operations" there spoken of is completely preserved because such an applicant is free to continue, without regulation, the precise pattern of his past operations. What this applicant seeks, of course, is an interpretation of the "grandfather" clause which would confer upon it authority in perpetuity to conduct an entirely new and different type of operation without the proof of "consistency with the public interest" which the statute requires as to such operations.

The Application as for New Rights.

The Commission correctly appraised the application as for "new" rights when it said:

Applicant, however, is not proposing any new operation. (R. 12).

and

On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation. (R. 12).

Filed, as stated, out of an "abundance of caution" (R. 66) it was not supported by any evidence that appellant intended to enter into any new operation or by the testimony of any prospective users of any new operation. At the conclusion of his presentation of the "grandfather" case counsel for appellant stated (R. 115, 116):

That is applicant's case. The applicant rests. We have no other witnesses. * * * We think the evidence, showing the fact that these people have operated for one hundred years, shows that the service is needed and that it would be consistent with the public interest.

Previously (R. 114) applicant's counsel had asked this question:

⁴The following is taken from the hearing before the Commission:

Q. What does BWC 3 seek?

A. That is an application form for a new operation. I never did think it applied to us, but it was, more or less, suggested by the Bureau of Water Carriers. We filed it as a matter of an abundance of caution and after consulting counsel we concluded to file it. It seeks rights to operate as an irregular contract carrier over the waters of the Mississippi River and Ohio River systems and their tributaries.

Q. (By Mr. Quirk) Now, as to these general commodities you have been asked several times, Mr. Barrett, about what you wanted. This is a leading question but I think it is pardonable. Is not what you want authority to do what you have always done?

A. (By Mr. Barrett) Exactly.

The Application for Rights as a "Furnisher of Vessels".

As we have shown, the Commission denied this phase of the application because there was no showing as to what the vessels carried, where they went, or the nature of the services performed with them.

Appellant is now contending that the Commission erred in this conclusion and its support for that contention is the third decision rendered by the Commission in *C. F. Harms Company, Contract Carrier Application*, 260-I. C. C. 171.

In any appraisal of this particular feature of the Commission's decision and its possible bearing upon the issues here presented, it should be helpful to consider first of all the essential difference between the conventional "contract" carrier which is an actual carrier or transporter of property and which is covered by the first paragraph of subparagraph (e) of section 302, on the one hand, and the "contract" carrier embraced in the second paragraph which is made such only by virtue of "furnishing" a vessel "to a person other than a carrier."

When the Commission, as in the *Harms Case*, *supra*, grants a permit to a "furnisher of vessels" under the second paragraph of section 302(e) it runs to what it describes as a contract carrier in the furnishing of vessels (under charter, lease, or other agreement) to persons other than carriers subject to the Interstate Commerce Act. (Emphasis supplied).

When it issues a "permit" to a contract "carrier", as distinguished from a "furnisher of vessels", it runs to what is described as

a contract carrier by non-self-propelled vessels with the use of separate towing vessels, (or self-propelled vessels, as the case may be) in the transportation of (certain specified commodities). (Parentheses added)

Legislative History.

The House version of the Bill (S. 2009) which, as amended, finally became the Interstate Commerce Act of 1940, underwent debate without passage in 1939. At that time the sub-paragraph as to the "furnisher of vessels" read:

For the purposes of this paragraph a person which, under a charter, lease, or other agreement, furnishes a vessel to another person, for compensation, for use in the transportation of property of such other person, shall itself be considered *to be engaged in the transportation of such property as a contract carrier by water.* (Italics ours).

It will be noted that, under that definition the "furnishing" was to *any* "person" and not "to a person *other than a carrier.*" It will be noted, also, that the "furnisher" was put under regulation as though "*engaged in the transportation*" of the property.

In that form the bill met vigorous opposition. Addressing himself to it at p. 13515 Congressional Record, July 21, 1939, Representative Wadsworth said:

It is provided here that if the owner of a barge or of a vessel charters that barge or vessel to another carrier, he, the owner, is still subject to this Transportation Act and all its regulations. Of course, that is not true with respect to a railway. A railway can lend its engines or its cars to another railroad and there is no responsibility thereafter for the operation of those cars or engines, but under this act, and it is rather cleverly put in, the charterer is subject to this act as *engaging in transportation.*

Mind you, this chartering is done in thousands of cases on the waterways and in coastal traffic. This bill proposes to upset it.

Let me illustrate what it does. A well-known, independent lumber dealer of the East came to me the other day and called my attention to the effect this would have upon the lumber industry. He said:

We get large supplies from the Pacific Northwest. We do not own any steamers. We have to send out to the Northwest and when we purchase or contract to purchase a cargo of lumber, we charter a vessel from an owner out there, and under a contract with him, we bring it around through the Canal and up the Hudson River to Poughkeepsie, N. Y.

Under this bill the owner of that vessel is subject to the Transportation Act. What will happen? He will not charter it. How can you expect him to be responsible for compliance with this law when he charters his vessel to another? Under such conditions he will not charter his vessel to another. Today this chartering goes on all the time, not only in the intercoastal but the coastal and inland waterway business. It is an element of that flexibility which distinguishes commerce by water, and yet this bill would throttle it.

In the debate of July 25, 1939 (Congressional Record p. 13918) Representative Kitchens proposed an amendment which in abridged form made the definition read:

*** a person which *** furnishes a vessel *** shall itself *not* be considered to be engaged.

and the amendment was adopted on July 25, 1939.

The "extended" remarks of Mr. Kitchens on his amendment *and the acquiescence therein of Chairman Lea* of the House Committee on Interstate Commerce, are interesting. They are reported at p. 14128 of Cong. Rec., July 26, 1939. Mr. Kitchens stated:

Mr. Chairman, most barge line operations are more or less seasonal. It is a common practice of every barge line, when its particular business is dull, to lease a number of its barges to some other operator or shipper during the dull season. The same is done with towboats. Surplus equipment is freely leased for long and

short periods of time under an open market which has been developed in certain navigation centers.

This bill would absolutely destroy this practice by contract carriers in that it specifically provides as to contract carriers that wherever any person leases or charters any equipment such as barges, towboats, or other vessels to another person for use in the transportation of the property of such person *it becomes a carrier engaged in the transportation of the property* and subject to all of the regulations set forth in the act. That this is utterly unfair is best illustrated by the fact that no such provision exists in the law today with respect to facilities of railroad carriers and motor carriers. Railroads have always been free to lease surplus equipment without such leases or such operations becoming subject to the jurisdiction of the Interstate Commerce Commission. It is a common occurrence for industrial plants to lease locomotives and other equipment of railroads and for railroads to lease such equipment to one another. However, when it comes to providing regulation for water carriers this bill imposes such onerous restrictions upon it as to make this practically impossible in their case.

For example, a barge line may want to lease a towboat to some private company for a period of six months. Under this law it would automatically become a carrier subject to regulations *as to the property which may be carried for such company*. It would be responsible for the operations and its charges for leasing the equipment would be subject to regulation by the Commission. If it should lease the towboat to another carrier it would apparently be responsible for the acts of such carrier. The bill is capable of interpretation to the effect that the charges of the lessee for performing these services and responsibility for its operations would also be the responsibility of the lessor. This is done by the language in sections 302(d) and (e). (Emphasis ours).

To which Chairman Lea replied:

I will state to the gentleman that I have no objection to his amendment. I concede that this provision as it

stands goes too far and the gentleman's amendment will help to adjust it.

The bill did not pass the House in 1939, and when it was resubmitted by Chairman ~~Lea~~ with his Conference Report of April 26, 1940 (Report No. 2016) the word "not" to which he had agreed in 1939, had been stricken but the definition had been considerably changed otherwise. It was made to read precisely as it was finally enacted into law and as we have quoted.

In his Conference Report (Ibid p. 77) the Chairman explained the change as follows:

The definition of "contract carrier by water" in the House amendment contained a sentence as follows:

For the purposes of this paragraph a person which, under a charter, lease, or other agreement, furnishes a vessel to another person, for compensation, for use in the transportation of property of such other person, shall itself *not* be considered to be engaged in the transportation of such property as a contract carrier by water.

In the conference substitute the word "not", which was inserted on the House floor, has been omitted, but the provision (which is in sec. 302(f)) has been limited so that it only applies where the vessel is furnished to a person *other than a carrier* subject to the Interstate Commerce Act, and the language is clarified to make sure that the person furnishing the vessel will not, *simply by reason of furnishing the vessel*, become a contract carrier subject to part III of the act *as to that part of its business not related to the furnishing and use of the vessel*. A new provision is added giving the Commission authority to exempt (either permanently or for a limited time) any person or class of persons when the Commission deems it unnecessary, in order to effectuate the national transportation policy, for such person or class of persons to be regulated as a contract carrier or contract carriers. (Italics ours).

In recognition of the essential difference between the two types of service or authority the Commission consistently

refuses to grant both types, of authority to a single applicant except under the requirements of section 310⁵ of the act which contemplates dual operating authority. (*Hyer Towing Co. Contract Carrier Application*, 250 I. C. C. 631; *Shamrock Towing Co., Inc., Contract Carrier Application*, 250 I. C. C. 788.)

We point out these differences in order to make it clear that even if the Commission erred in disposing of that portion of the application relating to the "furnishing of vessels" such error would have no effect upon its conclusions as to the conventional type of contract carriage covered by the first paragraph of section 302(e).

The Decisions in the Harms case.

Three decisions have been rendered by the Commission in the *Harms Case*. In its first decision in that case (250 I. C. C. 513) the Commission (Division 4) gave to Harms a very limited authority, viz., to furnish "non-self-propelled vessels * * * to be used in the transportation of scrap iron between ports and points on Long Island Sound, the Hudson River, and the area defined by our order of March 26, 1941, Ex Parte 140."

In that proceeding applicant urged that "the operations were performed by the *users* of the vessels and not by itself" and that it should have a permit "without limitations upon

⁵Which reads:

"(1) no person, or any person controlling, controlled by, or under common control with such person, shall hold a certificate as a common carrier by water if such person, or any such controlling person, controlled person, or person under common control, holds a permit as a contract carrier by water; and

"(2) no person, or any person controlling, controlled by, or under common control with such person, shall hold a permit as a contract carrier by water if such person, or any such controlling person, controlled person, or person under common control, holds a certificate as a common carrier by water.

the scope of the transportation performed *by the vessels.*" To which Division 4 replied at p. 516:

This construction of section 309 would require that no limitations be imposed upon the scope of the operations of *furnishers* of vessels, but that other contract *carriers* be limited to operations between the ports or over the routes served on and since the statutory date. (Emphasis supplied).

The decision of Division 4 was appealed on petition and in a report on reconsideration (250 I. C. C. 685) the Division removed the limitation as to the commodities which could be transported in the leased vessels and granted authority to furnish "non-self-propelled deck scows for the transportation of any kind of property." It kept in force, however, the *territorial* limitations within which the scows could be used, viz., "between ports and points on Long Island Sound, the Hudson River, and the area defined in our order of March 26, 1941, in Ex Parte No. 140."⁶

The decision was again appealed and in a final report by the entire Commission (260 I. C. C. 171) the "territorial" limitations were removed. The report recites:

Applicant on January 1, 1940, and continuously since, has held itself out to hire its vessels to anyone for any use for which they were suited without limitation as to the commodities to be transported or the place or places to which they were to be moved. It claims, therefore, that the permit to which it is entitled under the so-called grandfather clause of the statute would permit it to continue the carrier business in which it was engaged on and since the statutory date. It further claims that the limiting of its permit to defined territory based upon the use to which the hirer of its vessels used them on and since the statutory date restricts its business materially and prevents it from continuing the operations in which it was engaged and in which it continuously has been engaged. We conclude that the claims of

⁶In which latter proceeding the Commission had defined the limits of New York Harbor.

applicant are well grounded. The territorial limitations imposed by the permit issued April 14, 1943, are not warranted and should be removed.

It will thus be seen that applicant Harms was granted rights to furnish deck-seows without regard to the nature of the commodity to be loaded into them and without regard to the territory in which they are to be used, whereas appellant here has been denied rights as a "furnisher of vessels" because it did not show—

the nature of the services rendered, the commodities carried in, or the points served with such vessels (R. 11).

II.

Appellant Has Not Exhausted Its Remedy Before the Commission With Respect to the Matter of Chartering Rights.

The statutory provision which creates a novel type of "contract carrier" out of a "furnisher of vessels" does not contain within itself any limitations as to territorial or commodity coverage. The question of law or statutory construction as to whether the definition or the authority to be granted under it is subject to and qualified by the exemption provisions to which we have referred is one which will become resolved into settled law only through the decisions of the Commission or of the Courts in the Commission, upon judicial review, is found to have misconstrued the statute.

Thus far the Courts have not passed upon the question. The Commission apparently regards as settled law, at the moment, its third decision in the *Harms Case*. If applicant felt that the final disposition of the *Harms Case* was contrary to the disposition of its case it should have petitioned the entire Commission for reconsideration. This it has not done.

In this connection it is significant that when appellant petitioned on August 25, 1943 (R. 14 to 25, incl.) for recon-

sideration of the decision of Division 4 it made no mention of the matter of "chartering" rights and did not express itself as aggrieved by the denial of such rights. The Commission (Division 4) had rendered its second opinion in the *Harms Case* on April 14, 1943,⁷ in which, as stated, it had removed the "commodity" limitations with respect to the permit granted.

It is well settled that an appellant before this Court must show that it has exhausted its remedy before the administrative tribunal it seeks to have overturned. *Prentis v. Atlantic Coast Line R. Co.*, 211 U. S. 210, 232.

III.

The Type of Authority Which Applicant Seeks as a Carrier of Property Is Virtually Unknown to the Law.

The authority which this applicant seeks is that of a contract carrier of commodities generally. The very essence of contract carriage stamps it as a specialized or individual type of undertaking. The definition so characterizes it. It is a carrier which engages in transportation "under individual contracts or agreements." And under that characterization it is set apart from the common carrier which serves patrons and handles commodities indiscriminately. Indeed, if the one which asserts itself to be a contract carrier is not an actual party to an executory "individual contract or agreement" (or, in the case of one which aspires to be a contract carrier in the future, at least to a prospective or firm offer of such agreement) it would seem impossible to assign to it a separate place in the category of "carrier" or in the transportation system.

On the critical date—January 1, 1940—this applicant had two executory contracts. Both contemplated the transportation of a bulk commodity—stone—and appellant's wit-

⁷The last decision in the *Harms Case* was on January 4, 1944, after the appellants' petition was filed but prior to the argument in the court below.

ness conceded at the hearing (R. 97) that it had "not handled any stone in the last two years." Appellant, therefore, was naked of any "individual contract or agreement" covering transportation regulated by the act. Yet on that showing it is insisting that the Commission must not only grant it a permit as though it *had* performed regulated transportation, but that the permit must cover every conceivable commodity.

As shown, in respect of its application as for "new" rights, appellant introduced no "individual contract or agreement" for transportation subject to the act or any offer of one. Yet on that showing or lack of showing it insists that the Commission should have given it a permit to handle commodities generally, over the entire inland river system.

The instances are rare, indeed, in which the Commission has granted authority to a *contract* carrier to handle commodities generally. And in every one of such instances it has found that the applicant so treated *had actually handled general commodities*. In *Willis Contract Carrier Application*, 250 I. C. C. 179, the applicant was given authority to handle "commodities generally" to New Bern, N. C., because its consignee there was a "wholesaler of general merchandise" and because

Authority to transport general commodities is (was) essential in order for applicant to meet the needs of this party. (Parentheses added)

The Commission's report (p. 180) further shows that the "party" had been served by the applicant since 1933. Moreover, the authority was limited so as to cover two origin points only (Baltimore, Md., and Norfolk, Va.). In all other respects the applicant was given a permit only for specific commodities between specific ports.

Another exception in which a "permit" for the handling of general commodities was issued to a contract carrier was in *Universal Transp. Co., Contr. Car. Appns.*,

250 I. C. C. 737, but the authority was limited to transportation "*for the United States*" for whom the applicant for some years had transported salvaged or used materials of a general nature.

The only other instance in which a contract carrier by water has been granted authority to transport commodities generally is in a decision dated February 12, 1945 (not printed) in *Atwacoal Transportation Company Contract Carrier Application*, but there again, the decision contains a recital that—

Applicants in the past have not limited their service to the handling of specific commodities and have in fact handled a wide variety of articles. (Emphasis supplied).

In all other cases, although the applicants requested authority for general commodities the permits have been limited to specific commodities *actually handled*.^{*} No such authority has been granted in any situation where, as here, there is no showing that *general* commodities have been actually handled by an applicant.

^{*}Thus *Reedville Oil & Guano Co.*, 250 I.C.C. 71 (commodities used by fish processing plants); *John L. Goss Corp.*, 250 I.C.C. 101; 250 I.C.C. 485 (granite); *Choctaw Trans. Company*, 250 I.C.C. 106 (forest products and logging equipment); *Pope & Talbot, Inc.*, 250 I.C.C. 117 (iron and steel products and specified related commodities); *Oliver J. Olson & Co.*, 250 I.C.C. 151 (lumber and lumber products); *Horace X. Baxter S. S. Co.*, 250 I.C.C. 162 (same); *W. H. Wood*, 250 I.C.C. 165 (same); *Wood Towing Corporation*, 250 I.C.C. 170 (logs); *Beardslee Launch & Barge Service*, 250 I.C.C. 173 (poles and piling); *Schafer Bros. S. S. Lines*, 250 I.C.C. 187, 250 I.C.C. 353 (lumber and lumber products); *A. B. Johnson Lbr. Co.*, 250 I.C.C. 200 (same); *Chamberlin Cont. Car. Application*, 250 I.C.C. 226 (same); *West Coast S. S. Co.*, 250 I.C.C. 235 (same); *United States Lighterage Corp.*, 250 I.C.C. 347 (lumber and piling); *Dorothy Philips S. S. Co.*, 250 I.C.C. 391 (lumber and lumber products); *E. K. Wood Lbr. Co.*, 250 I.C.C. 499 (same); *Lend-ten Cont. Car. Appn.*, 250 I.C.C. 519, 260 I.C.C. 189 (certain lumber products); *Kahlke Contr. Car. Appn.*, 250 I.C.C. 617 (construction materials); *Curlett Cont. Car. Appn.*, 250 I.C.C. 700 (lumber and fertilizer materials).

To the same general effect have been the decisions of the Commission under Part II of the act. That is to say, no contract carrier has been authorized to haul *general* commodities except upon a positive showing that it had in the past handled such a wide and diversified list of commodities that no practical limitation could be applied. Such a case was *Lee Wilson & Co., Contract Carrier Application* 29 M. C. C. 525, relied upon by appellant. Speaking of applicant's past experiences in that case the Commission said at pp. 530, 531:

The restriction referred to in the *Keystone case*, *supra*, provides (at page 496) that the general form of authority to be granted contract carriers engaged in the particular type of operations discussed in that proceeding should be as follows:

Applicant is hereby authorized to engage in the business of a contract carrier by motor vehicle for the transportation, in interstate or foreign commerce, under special and individual contracts or agreements, with persons (as defined in section 203 (a) of the Motor Carrier Act, 1935), who operate retail stores, the business of which is the sale of food, of the commodities indicated below, over irregular routes between all points in the territory specified below:

Such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, and, in connection therewith, equipment, materials, and supplies used in the conduct of such business
 * * * (Here specify operating territory).

An analogous situation is not present in the instant case. Such commodities as livestock, logs, lumber, ties, cotton, cottonseed, soybeans and soybean products, corn, corn meal, boxes, and farm implements, among others, will be transported out-bound to Memphis and other markets, and a variety of commodities will be transported in-bound to such business enterprises as grocery stores, a bank, a drug store, an alfalfa-dehydrating plant, a flour mill, cotton gins, a filling station,

and a cotton-oil mill. *The variety of commodities which applicant will be called upon to carry makes it impractical to attempt to narrow this service to a particular class or classes of commodities.* Applicant will, therefore, be authorized to transport general commodities, except certain articles specified in the findings herein which it apparently has not hauled in the past and will not haul in the future. (Italics ours.)

It is worthy of note, also, that the application considered in the above case was for authority to institute a "new" operation and was not presented under the "grandfather" clause.

Indeed, in the absence of a definite showing as to actual or prospective performance it is difficult to see how the Commission could comply with its statutory duty in the grant of permits to "contract" carriers. Section 309 (g) under which it issues such permits instructs it that—

The *business* of the carrier and the *scope* thereof shall be specified in such permit * * *

the "business" of a carrier and its "scope" are determinable from what it has done in the past or as to which it has commitments for the future and not from what it hopes or would like to do.

The "contract" carrier as recognized in Parts II and III of the act is entirely a creature of statute and for a time there was doubt as to whether such a carrier could be brought under regulation. It was recognized, however, that unless he could be regulated and thus brought under control it would be vain to attempt regulation of the common carrier. When the Motor Carrier Act, 1935, was under consideration by the Committees of Congress, Mr. R. H. Aishton, then President of the American Railway Association, testified on March 8, 1932 before the Senate Committee on Interstate Commerce:

Experience of the several States that have attempted to regulate transportation of property by motor

vehicles has demonstrated that unless contract carriers are subjected to appropriate regulations bringing their operations into suitable relation with those of common carriers, any attempted regulation of common carriers is ineffectual and unfair.

We therefore believe that all charter or contract carriers by motor vehicle (as defined in S. 2793; known as the Couzens Bill), of either persons or property, should be subject to regulation. Such regulations should require them to register with the Commission, and upon such registration and proper proof of compliance with the requirements of law they should be entitled to a permit to operate in interstate commerce.

This permit should be issued for a definite period to be prescribed by the Commission.

That such regulation was to be imposed for the protection of common carriers was made clear by the testimony of the late Commissioner Eastman who acted in an advisory capacity to the legislative committees throughout consideration of the legislation. Testifying before the House Committee on Interstate Commerce in connection with the 1935 act, Mr. Eastman said:

So far as the regulation of these private and contract carriers is concerned, it seems to me that the important principle which should govern *and which justifies* any such regulation *is the need for protecting the common carrier who undertakes to serve all the public.* The common carrier is the one, it seems to me, that the Government ought, particularly, *to foster and protect.* Now the contract carrier or private carrier can operate in such a way as to be detrimental, unfairly or improperly, to the interests of the common carrier. To the extent that such conditions exist, the Government is justified in interfering for the sake of *protecting the common carrier;* and it is on that principle that the regulation of the contract carrier in this bill very largely rests. (Italics ours.)

Quite obviously this "protection" would be an empty thing if an applicant for contract carrier rights were to be

given a "roving commission" such as is here claimed, without any regard whatsoever as to the question whether the *existing* service, of common or contract carriers is adequate to meet the reasonable demands of commerce.

The extreme care which the Commission is called upon to exercise in the matter of limiting the operating rights of a "contract" carrier, and the theory that such carriers are not entitled to "free lance" authority is aptly demonstrated by the decision of this Court in *Noble v. United States*, 319 U. S. 88.⁹ That case brought into direct focus the sweep of the mandate of Congress that in granting permits to contract carriers the Commission "shall" specify

The business of the carrier and the scope thereof. . . .

Noble, a *contract* carrier by motor vehicle had engaged during the critical period, in the haulage of certain specified commodities within a definite territory and his patrons had consisted of persons who operate "food canneries or meat-packing businesses." In granting him a "permit" under the "grandfather" clause the Commission had authorized him to

(a) haul all of the commodities handled in the critical period

(b) over all of the routes traversed

but had limited his future dealings to those "who operate food canneries or meat-packing businesses". The case went to the Courts on the contention, as stated by this Court (p. 91):

Appellant's chief objection to that limitation of his rights under the "grandfather" clause is that the Commission has restricted *the shippers or types of shippers*

⁹That case concerned the administration of Part II of the act (Motor Carrier Act, 1935) but the provisions governing the issuance and the form of "permits" are an exact counterpart of those in Part III.

for whom he may haul the specified commodities. His argument comes down to this: once the territory which he may serve and the commodities which he may haul have been determined, he should be allowed to haul these commodities *for any one he chooses* within those territorial limits. (Italics ours.)

The Commission in *Keystone Transp. Co.*, 19 M. C. C. 475, on re-examining its duty to specify "the business of the contract carrier and the scope thereof" had concluded that that phrase meant

more than just the business of *being* a contract carrier within a defined territory. It is all inclusive and connotes in addition to the business of *being* a contract carrier *the exact and precise character of the service to be rendered by such carrier.* (Italics ours.)

Commenting on the views of the Commission in that case this Court said at pages 91, 92:

We agree. An accurate description of the "business" of a particular contract carrier and the "scope" of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type or class of shippers served. Unless the words of the act are given that interpretation, permits under the "grandfather" clause may greatly distort the prior activities of the carrier. *He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers*, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 86 L. ed. 971, 62 S. Ct. 722. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that "substantial parity between future operations and prior bona fide operations" which

is contemplated by the Act. (*Alton R. Co. v. United States*, 315 U. S. 15, 22, 86 L. ed. 586, 595; 62 S. Ct. 432) would be frequently disregarded. The "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system; but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See 206(a), 207, and 209(b), 49 U. S. C. A. §§ 306(a), 307, 309(b), 10A F. C. A. §§ 206(a), 307, 309(b). (Italics ours.)

At pages 18 and 19 of its Brief herein, appellant undertakes to distinguish the decision in the *Noble Case* but succeeds only in demonstrating that due to the very vague and indefinite pattern of its operation it would be impossible to apply the rule approved in that case. Appellant's contentions simply come to this: Because its operations on the critical date were very circumscribed¹⁰ its authority for the future must be unlimited; because on the critical date it had no contracts covering the transportation of regulated commodities, its future authority must encom-

¹⁰At the hearing (R. 96) this colloquy occurred:

"Q. If the Commission limited your authority to specific commodities rather than general commodities, are you satisfied with the commodities you listed in your Exhibit No. 1?"

A. No sir. I have stated over and over again that the business as reflected in Exhibit No. 1 being the business that was transacted in the five year period, namely, the last five-year period, does not reflect the kind of business we have traditionally done and I further repeatedly stated that any five-year period in our history would not give a general picture of the type of our business.

Q. You are relying on this exhibit to show the character of operation since 1936?"

A. In those five years, yes."

pass all traffic, regulated and unregulated. Stated another way, under the doctrine of the *Noble Case* it is proper and necessary to hold a contract carrier to the precise pattern of the past, but since this appellant had no precise pattern it argues that it must be given authority broader than that enjoyed by any operator on the inland river system.

As so ably pointed out by the late Commissioner Eastman, the contract carrier is under no obligation to serve the public. It is at full liberty to "pick and choose" its traffic. It is ~~not~~ subject to the rule against discrimination. The Commission summed the matter up very forcibly in *Contracts of Contract Carriers*, 1 M. C. C. 628, 631, where it said:

This inherent and inevitable disadvantage of the common carriers is accentuated and becomes a source of positive peril to them when competitors, claiming to be contract carriers, are promiscuous in their dealings with shippers, shop around among them freely, and confine their actual contracts to individual shipments. Under such conditions, shippers, especially those who have a large volume of traffic to offer, may play the contract carrier against the common carrier and contract carriers against each other, with the result that the unfair and destructive competition which Congress sought in the act to abate is instead intensified, particularly in view of the fact that the publication of their specific rates, as required by the act, makes the common carriers open targets. Ultimately, also, such conditions prove detrimental, not only to the carriers, both common and contract, but to the shippers, the public safety, and the welfare of employees.

In the light of such possibilities it would be a serious matter to authorize a "free lance" contract-carrier operation, such as is here proposed, on the entire inland river system even if the proof were convincing. In this case the Commission was asked to make such a ~~thorization~~ without any proof of the handling of regulated traffic during the critical period or without any proved prospect of handling it in the future.

IV.

The Cases Relied Upon by Appellant Afford No Support to Its Position.

The decisions relied upon most heavily by appellant are those of the Commission in *Russell Bros. Towing Case*, 250 I. C. C. 429; in the *Moran Towing & Transportation Company Case*, 250 I. C. C. 541; 260 I. C. C. 269; and in *W-896 Newtex Steamship Company Application* (January 11, 1945, not yet printed).¹¹

The Russell Bros. Case.

In its decision in the above case the Commission (Division 4) found in effect that in determining the territorial scope of an applicant's past operations it is proper to consider both regulated and unregulated traffic. But irrespective of the soundness of this doctrine it has no application in instances where both types of traffic were not handled. A notable example of the application of the latter principle is to be found in the decision in the *Canal Lakes Towing Company Application*, 250 I. C. C. 624, 625, 626, where the Commission said:

Applicant contends that it towed oil during 1939 and 1940 only because the demand for its services in that respect kept its vessels in constant operation, and that it would have sought any business available if its vessels had been available for additional transportation. We have heretofore authorized general towing operations upon a showing that the carrier had held out and performed a general towage service for the public although a large part of the transportation by such carriers on and since January 1, 1940, fell within various exemptions specified in the act or by our orders thereunder. See *Russell Bros. Towing Co., Inc., Common Carrier Application*; 250 I. C. C. 429, and *Moran Tow-*

¹¹We have already discussed the *Wilson Case*, also relied upon in support of the claim for general commodity authority.

ing & Transp. Co., Inc., Applications, 250 I. C. C. 541. In those proceedings, however, it was shown that the carriers had engaged in a *comprehensive towage service* which included the transportation of diversified commodities, including transportation which would be subject to regulation if it were not for our general orders of exemption. The specialized towage of one commodity by applicant on and since January 1, 1940, does not constitute the performance of general towage. (Italics ours.)

Appellant's strategy in bringing forward the *Russell Bros. Case*, is, of course, plain. It hopes first to have itself made subject to the act as a "furnisher of vessels" and, having established that fingerhold, to bring to its aid the doctrine of the *Russell Bros. Case* that *both* regulated and unregulated activities should be considered in determining rights. The fallacy of the plan lies in the fact that the Commission in referring in that case to both regulated and unregulated traffic, had reference to bulk and nonbulk *commodities*, as no question of chartering rights was considered in the case. Furthermore, as we have shown, there is a clear distinction as between the contract carrier who carries and the one who is such only by virtue of "furnishing vessels."

The Moran Towing Company Case.

The statement on pp. 13 and 14 of appellant's brief here that

A certificate was issued to Moran, although engaged in service *all of which was exempt* from (sic) the provisions of section 303(b) of the act

is not borne out by the reports of the Commission. Even with respect to transportation on the New York State Canal System where the point that Moran had handled nothing save exempt transportation was most vigorously pressed, the report of the Commission recites that "a substantial number of varied tows have been performed each year by

applicant in that territory." (p. 275) Furthermore, it denied operating authority to Moran as to local traffic on the Great Lakes because (p. 75) "the one service between Toledo and Buffalo was probably exempt under section 303(a)."

The chief distinction, however, as between the *Moran Case* and this is in the characteristics of the two operations. Moran, like the applicant in *Cornell Steamboat Co. v. United States*, — U. S. —, ¹² is what is known in the trade as a "towel." That is to say it tows loaded barges without any official knowledge of the contents of the barge. It was found to be a "carrier" only in the sense that a loaded barge was regarded as "property." The peculiar nature of Moran's business ¹³ was what prompted the Commission to say at p. 272 of its last decision:

At the further hearing applicant submitted detailed evidence of its operations during 1939 and since; and attempted to establish that some nonexempt operations had been performed. *We think it unnecessary in this case to determine whether the services performed were or were not actually subject to the act.* The nature of the cargo in the vessels towed is usually the determining factor as to whether or not the service is exempt, but applicant's towage service is performed without regard to the nature of the cargo loaded in the vessels towed by it. (Italics ours).

Obviously if Moran had been denied a certificate to operate it would have had to *change entirely the character of its business*. That is to say, it would have been compelled to inform itself as to each offer of a loaded barge in order to satisfy itself that it was of an exempt character. The operations of this appellant have nothing in common with the operations of Moran. This appellant knows the nature

¹²Law Ed. Ad. Op. Vol. 88, No. 12, p. 712.

¹³And the business of Russell Bros. was largely of the same nature.

of the commodities handled and bases its charges on the weight thereof. (R. 131-136).

Another distinguishing feature which separates both the *Russell* and *Moran* decisions from that in this case is the fact that both of those operators were found to be common carriers. As such and in the general conduct of their business they held themselves out to transport all freight offered without regard to its nature.¹⁴ In determining the scope of rights to be granted a common carrier it is proper to give considerable weight to the element of holding out, especially if it is consistent with actual performance and coupled with the ability to make it good. But this applicant can find no such refuge because the moment it shows or alleges a general "holding out" it loses its status as a "contract" carrier. (Compare *Noble v. United States*, *supra*).

The Newtex Steamship Company Case.

It is not easy to understand how the appellant can gain any comfort from the decision in the *Newtex Case* or find any support whatsoever for the extravagant statement (p. 24) in its Brief that

The action of the Commission in the *Newtex* . . . case can not be reconciled with its action here.

As the report in that case shows, *Newtex* had operated a regular common carrier steamship service between New York, on the one hand, and Texas ports, on the other hand, for some 14 years prior to 1940. In the latter year it sold its vessels to the British Government and retired from the trade under such conditions as to forfeit its "grandfather" rights. Later it decided to reenter the trade as soon as

¹⁴At p. 431 of the decision in the *Russell Bros. Case* the Commission stated:

"There is printed on applicant's advertising matter and letter heads an offer to tow "anything—anywhere—anytime."

vessels could be procured and service resumed²⁵ and it filed an application for "new" rights with the Commission. The Commission's report recites the facts that Newtex came before it with a definite proposal to serve definite ports and its application was buttressed by the testimony of many shippers and shipping interests or organizations to the effect that the proposed service would be necessary in the public interest. If this applicant, in support of its application for "new" rights had introduced testimony from prospective shippers to the effect that existing service is inadequate and as to the necessity of entering into "special and individual contracts" with applicant as to specific carriage, the Commission, no doubt, would have given such evidence the same consideration as that accorded in the *Newtex Case*. Instead, appellant chose to rely on "tradition" and on vague and indefinite references to past activities²⁶. Such a presentation offers a poor foundation for an accusation that the Commission acted "arbitrarily and capriciously."

CONCLUSION

The large common carriers referred to by appellant at p. 25 of its Brief are not placed in any "preferred position," as alleged, by the denial of this application. On the contrary they, just as applicant, are in precisely the same position in which the statute found them and the whole theory of the "grandfather" clause, stated by this Court, is the preservation of a "substantial parity between future operations and prior bona fide operations." (*Alton R. Co. v. United States*, 315 U.S. 13.)

If these so-called "large carriers" are in a position to handle general cargo today it is because they handled such cargo in the past. If appellant's denied that right it is be-

²⁵The entire "trade" is closed now because of the War.

²⁶Except, of course, as to the period from 1936 to 1942, during which all of applicant's activities, transportation or otherwise, are noted.

cause it did not so handle it. What this appellant seeks is not the preservation of a "substantial parity" with its past operations but the creation for it of an entirely new operational pattern under which, free of all of the duties and obligations imposed upon common carriers it will be in a position where it can make an "open target" of the most desirable portions of their traffic.

But even if we were to concede, which, of course, we do not, that the intervening and protesting carriers are to have a "preferred position" if the Commission is sustained, such position would be as nothing compared to that which appellant aspires. While the "larger common carriers" would be limited in their operations to definite streams or portions of streams, or ports, appellant could ply the entire system. While the "larger common carriers" would be compelled to publish and adhere to their precise rates, appellant would be free to discriminate and to center its attention only upon the most desirable traffic of the common carriers. Beyond peradventure of doubt the authority which this appellant seeks would be the most valuable authority possible to visualize with respect to river transportation.

Appellant's philosophy seems to be that inasmuch as there is no "five year period in our history" which would "give a general picture of the type of our business" it must, under the law, be given a roving commission to do anything it pleases. True, it had that privilege prior to 1940 and to that extent regulation has come into contact with free enterprise. (Compare *Louisville & N. R. Co. v. Mottley*, 219 U.S. 467.) But prior to 1920, the Pennsylvania Railroad, for example, was at liberty to construct additional lines if it chose to do so. Since 1920, however, it can not do so without first obtaining a certificate of "public convenience and necessity" from the Commission. Prior to 1935, a motor carrier could have plied any highway in the United States so far as Federal restrictions were concerned. Since 1935, however, it has been held to the scope of its actual and not its "potential or simulated" service as of the critical date. *McDonald*

v. *Thompson*, 305 U.S. 263. If these "public interest" provisions are not interpreted and applied so as to preserve a "substantial parity" as between the future and the past in connection with "grandfather" rights and to police "new" projects to the end that wasteful and uneconomic duplication of transportation facilities or destructive competition is avoided, then they have no place in the statutes.

The decision of the Commission is sound and the lower Court properly affirmed it. We accordingly request that this Court take similar action.

Respectfully submitted,

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March, 1945.

APPENDIX

PROVISIONS OF THE INTERSTATE COMMERCE ACT RELATING TO, EXEMPTIONS

APPLICATION OF PROVISIONS; EXEMPTIONS

SEC. 303. "(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported, is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

"(c) Nothing in this part shall apply to transportation by a contract carrier by water of commodities in bulk in a non-ocean-going vessel on a normal voyage during which (1) the cargo space of such vessel is used for the carrying of not more than three such commodities; and (2) such vessel passes within or through waters which are made international for navigation purposes by any treaty to which the United States is a party.

"(d) Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U. S. C., 1934 edition, Supp. IV, title 46, sec. 391a).

"(e) It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported,

their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to October 1, 1940, shall be exempt from the provisions of this part until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operation of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

“(f) Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—

“(1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be transportation subject to part I when performed by such carrier by railroad, and transportation subject to part II when performed by such motor carrier.

“(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier sub-

ject to part II, or a water carrier subject to this part in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

(c) Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement, to or from a place without the limits of any such harbor or harbors; or (2) to transportation by small craft of not more than one hundred tons carrying capacity or not more than one hundred indicated horsepower, or to vessels carrying passengers only and equipped to carry no more than sixteen passengers, or to ferries, or to the movement by water carriers of contractors' equipment employed or to be employed in construction or repair for such water carrier, or to the operation of salvors.

"(h) The Commission shall have the power to determine, upon its own motion or upon application of any party in interest, whether any water carrier is engaged solely in transporting the property of a person which owns all or substantially all of the voting stock of such carrier. Upon so finding the Commission shall issue a certificate of exemption to such carrier, and such carrier shall not be subject to the provisions of this part during the period such certificate shall remain in effect. At any time after the issuance of such certificate the Commission may by order revoke such certificate if it finds that such carrier is no longer entitled to the exemption under the foregoing provisions of this subsection. Upon revocation of any such certificate the Commission shall restore to such carrier, without further proceedings, the authority, if any, to engage in transportation

subject to the provisions of this part held by such carrier at the time the certificate of exemption pertaining to such carrier became effective. No certificate of exemption shall be denied and no order of revocation shall be issued, under this subsection, except after reasonable opportunity for hearing.

“(j) Nothing in this part shall be construed to interfere with the exclusive right by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State.”

SUPREME COURT OF THE UNITED STATES.

No. 630.—OCTOBER TERM, 1944.

The Barrett Line, Inc., Appellant,

vs.

The United States of America, In-
terstate Commerce Commission,
et al.

Appeal from the District
Court of the United States
for the Southern District
of Ohio.

[June 18, 1945.]

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The Interstate Commerce Commission denied appellant a permit to act as a contract water carrier under the Transportation Act of 1940, 54 Stat. 898, Part III of the Interstate Commerce Act. A three-judge District Court dismissed the complaint which sought review of that order. The appeal is from this judgment.

In May, 1941, appellant applied for a permit to carry general commodities, with exceptions not now material, between points on the Mississippi River and its tributaries. The authority sought was to "continue an operation in existence January 1, 1940, and continuously thereafter," as a contract carrier of property over irregular routes, pursuant to "grandfather rights" claimed under § 309(f) of Part III. A year later, while the grandfather application was pending, appellant filed another application as a precautionary measure. This sought, in the alternative, leave to perform the same service as a new operation "consistent with the

Section 309(f) provides in part:

"Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: Provided, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g)." 49 U. S. C. § 909(f).

Section 310 relates to dual operation as common and contract carrier, § 311 to temporary operations.

the public interest and the national transportation policy" under § 309(g).²

Protests were filed by other carriers and the two applications were heard together before an examiner in September, 1942. He concluded that the showing did not warrant granting of the grandfather application, but recommended granting of the permit under § 309(g). Division IV however denied both applications, that under § 309(f) for failure to make the required showing of actual operations on and after the crucial date, the one under § 309(g) on the ground that appellant had "failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation." A petition for reconsideration by the full Commission was denied and the District Court adopted its findings and conclusions in a *per curiam* opinion.

The evidence consisted of exhibits and the testimony of appellant's president, Barrett. The story is of an old-style family institution which, for four generations, has had part in life on the Mississippi and its tributaries. As told by Captain Barrett, the line not only pioneered in the great development of inland water transportation of the middle nineteenth century. Its history has been constantly, during this century, one of pioneering in various fields of water transportation. And thereby, the inference seems justified, hangs the reason for its survival in an age when water transportation, like so much else of industry, has been taken over largely by corporate or governmental enterprise. Now the vicissitudes of regulation have been added to those of competition, appellant urges, to threaten its continuance.

² Section 309(g) provides:

Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part of those lawfully established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require." 49 U. S. C. § 909(g).

The concern, incorporated in 1926 as successor to individual and partnership forms of operation, remains small. At the time of the hearing it owned twenty-one barges and two towboats, with two derrick boats and other equipment. Cincinnati is the port of registration; Cairo, Illinois, the situs of the fleet by reason of its accessibility to conjunctions of many rivers.

Operations historically have been highly selective and varied in character. Since 1910, at any rate, they have been limited generally to bulk materials, the greater number of which may be subjected to exposure to weather without damage, such as scrap iron, pig iron, fabricated steel, piping, bauxite ore, coal, paving brick, and stone, excluding such items as furniture. At one time or another, however, automobiles, sulphur, powder, grains, salt and petroleum products have been carried. So far as appears the line has not held itself out in this period as a common carrier and does not now seek to become one. Its business has been strictly by special contract, negotiated with reference to the season, the course of the river required for the operation, times of loading and unloading, and other special factors. It is, in other words, an irregular operator performing what it characterizes as "special and sporadic services under special contracts and conditions." The sporadic as well as the special character of the service becomes important, as will appear, for appellant's position on the issues.

The nature of the service and the character of the equipment are correlated. The barges are of steel construction, designed to carry dry or liquid cargo, the latter by adding piping and fittings when required. At the time of the hearing nine had been converted in this way and were used in petroleum traffic, three by appellant and six under charter to the Standard Oil Company of Ohio. Of those remaining, six were under charter, to be converted to petroleum carriers; two were being used in carriage of coal; and four were "available for such use as we put them to." Captain Barrett testified that if the movement of petroleum products should cease the tankers readily could be reconverted for hauling dry cargo.

The service includes freighting, either with appellant's own barges and power or by towing barges owned by others. In addition appellant engages in chartering, including the leasing or chartering of equipment, at times with crew, to others. The

chartering, according to Captain Barrett, involves "wide ramifications," often with difficulty in determining "just who is the operator, whether it is the shipper who is responsible, and therefore, the operator, or whether it is the carrier, who furnishes the equipment."

To establish its right to a permit, whether "grandfather" or "new operation," appellant offered evidence consisting of an exhibit listing all of its operations from January 1, 1936, to August 11, 1942, with information concerning the name of the customer, origin and destination, and nature of the cargo. No effort was made to prove specific operations in similar detail prior to the former date. But a written "Statement of the History, Type and Scope of Operations and Services of The Barrett Line, Inc.," substantiated by the testimony of Captain Barrett, described in a general way the character and scope of such movements.

The general effect of the historical evidence was to show the varied and sporadic character of the operations from about 1910. It appeared that the company might be without contracts or business for intervals of several months at a time. Much of its activity was in the nature of "pioneering trades." In brief this consisted in demonstrating the feasibility of water transportation for particular commodities. Generally, when the demonstration had been made, the result was for the shipper or another to take over the operation and appellant then would await or seek another similar opportunity.³

The evidence, being general in character, was lacking to a large extent in dates concerning specific operations during the latter part of the period; so that for some ten or twelve years prior to January 1, 1936, it is difficult to gather what specific kinds of movements were being made, for whom, between what points and

³ Thus, according to the testimony, the line pioneered in the transportation by water of petroleum in 1912 or earlier; of steel pipes from Pittsburgh in 1920; of powder in the same year; of automobiles to points downstream from Pittsburgh and Cincinnati; of bauxite ore for the Aluminum Ore Company; of paving brick to New Orleans; of riprap stone used by the Engineering corps for paving river banks, etc.

Frequently the demonstration resulted in appellant's supplying equipment to the shipper when the latter took over the business, as, for instance, when the Standard Oil Company of Louisiana purchased boats and barges to continue the demonstrated petroleum operation with its own fleet. Other instances included sales to Atlas Cement Co. and Carnegie Steel Co.

Miscellaneous services also were rendered to other carriers, before and after 1936, including relief of grounded or disabled vessels, raising of sunken vessels, storage of barges or vessels, etc.

with reference to what materials. However, the general inference would seem justified that any suited to the equipment and the rather indefinite criteria used for negotiating contracts were taken when opportunity offered; otherwise the fleet remained idle.

On the other hand, the evidence supplied by the exhibit concerning movements between January 1, 1936, and August 11, 1942, is much more definite. In all instances where the specific character of the cargo is mentioned, except one shipment of fabricated steel and piling in 1936, either stone or petroleum products, including gasoline and furnace oil, exempt commodities, are mentioned. A very considerable number of items designate "Miscellaneous Cargo" and there were some 44 instances noted simply as "charter," without reference to character of the cargo, including in which equipment was leased or chartered to shippers not carriers subject to the Act. A few items specified vessel storage, "damaged barge," steamer aground, furnishing steam and like services to other carriers. In two instances "towing" was specified for "U. S. Engineers."

The "miscellaneous cargo" items largely involved towing loaded barges of other carriers, including the American Barge Line and the Mississippi Valley Barge Line. In some instances Barrett identified the specific cargoes, as, for example, a movement of the former company's barges loaded with scrap iron, sugar and molasses and some of the latter's bearing packaged freight. In such cases, however, since only motive power was furnished, and to another carrier, appellant disclaimed, relying upon the movements "to establish that he [it] is a common carrier of general commodities," but put them in "to show the general sweep and character of the service performed" as a contract carrier. Barrett testified that appellant did not always know what was in such barges, that the charges were on a per diem basis and it therefore made no difference to appellant what was in the barges.

The difference, if any, between this towing and chartering when labelled as such is somewhat nebulous, if indeed it is at all material. But concerning the latter the witness gave similar testimony; that appellant's charges, whether for motive power, barges or both, were on a per diem basis, except in one instance specifying a barrel rate, and that appellant was not concerned with the character of the cargo or where the boats went, although the company's trip sheets, not presented in evidence, would show the latter.

The only evidence, apart from the exhibit, as to operations after January 1, 1940, consisted in Barrett's testimony, summarized above, relating to appellant's equipment and its use at the time of the hearing. This, as may be recalled, related exclusively to transportation of petroleum products, directly or under charter; the use of two barges for carrying coal, the availability of four others "for such use as we put them to."

It should be added that, according to the evidence, one factor inducing the concentration upon petroleum products after 1940 was the effect of the war emergency upon the carriage of these products from southwestern producing fields to central and eastern communities, together with encouragement the line received from officials of the Government to convert its barges into tankers and engage in this business. It seems obvious that, with return to normal modes of transportation as the war emergency passes, and the development of new facilities accelerated by it, the life span of this concentration is likely to repeat appellant's typical "pioneering" performance.

Appellant and the Commission are at odds upon the effects of the showing made concerning movements on and after January 1, 1936, and as to whether the Commission erroneously refused to take account of earlier ones shown by the history prior to that time. The Commission thought that it should disregard them, more particularly with reference to the "grandfather" application, as being too remote to substantiate the claim of "bona fide operation" on the crucial date within § 309(f),⁴ and found that the movements shown after January 1, 1936, were insufficient to establish the claimed rights because all, except one, were of exempt commodities, including petroleum products which were the only ones carried after January 1, 1940, except coal, which also is exempt.

Caught between the upper and nether millstones, so to speak, of denial of "grandfather" rights and a permit for new opera-

⁴ The opinion of Division IV stated: "The term 'bona fide operations' has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operations in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since."

tions,⁵ appellant questions the Commission's limitation of evidence to be considered to that affecting operations after January 1, 1936; its evaluation of the evidence taken into account, particularly that relating to chartering, as showing transportation of exempt commodities only; its interpretation of the statutory provisions in their bearing upon these issues, especially as requiring a showing that chartering operations include nonexempt commodities to justify issuance of a permit; its conclusion that the showing was not sufficient to support the application for "grandfather" rights; and the further conclusions concerning the showing as effecting the application to perform new operations.

The short effect of appellant's position is that the Commission's action has limited it to transportation of exempt commodities only and that, if so limited, grave injury will result for its business. It maintains that, in view of its history and the facts properly interpreted, it is entitled to a permit for the transportation of commodities generally throughout the Mississippi system, including its tributaries, and that the permit preferably should be under the grandfather clause; if not, then for a "new operation."

The controversy has become most crucial in relation to chartering. The Commission found that these activities related, in the crucial period and on the showing made, only to exempt commodities, for carriage of which authority is not required,⁶ and concluded that appellant was therefore not engaged in chartering operations subject to Part III or entitled to a permit for them. The opinion stated: "... the only transportation which might be subject to regulation under part III was that of chartering of vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager show-

⁵ The grandfather rights were denied, of course, because in the Commission's view, the operations shown to sustain them were too far removed in the past. On the other hand, the permit for new operations was denied, according to its brief, because "appellant proposed no change in mode of operation but planned to continue doing business as in the past."

⁶ Exemption is provided by § 303 for various kinds of transportation including, under limitations specified, carriage of bulk commodities when the vessel is used to transport not more than three, § 303(b); carriage of liquid cargoes in bulk in certified tankers, § 303(d); transportation solely within the limits of a single harbor, § 303(g).

The Commission has uniformly denied permits or certificates where only exempt transportation is involved. Cf. *Upper Mississippi Towing Corp.*, Common Carrier Application, 260 I. C. C. 292, 293; *Gallagher Bros. Sand & Gravel Corp.*, Contract Carrier Application, 260 I. C. C. 224, 225.

ing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations subject to part III of the act."

Appellant attacks this finding and the conclusion as contrary to law. The argument is founded upon § 302(e), which defines "contract carrier by water" and provides that the furnishing of a vessel under charter or lease to a person other than a carrier subject to the Act, for use in transporting the latter's property, shall be considered to constitute "engaging in transportation" within the meaning of the definition of "contract carrier by water."

Although it is true that no permit is required if only exempt commodities are carried in chartered vessels, appellant construes § 302(e) to entitle it to a permit if on the crucial date it was engaged in bona fide chartering operations, without regard to whether the commodities actually carried were exempt or non-exempt. In this view the Act is not concerned, so far as it relates to chartering, with the character of the commodity, but takes account only of the furnishing of the vessel; and the Commission, by requiring a showing as to the nature of the commodity, added a requirement not included or authorized by the statute.

Accordingly, since the evidence clearly disclosed numerous charter operations within the critical period, appellant draws two conclusions: (1) that it was entitled to grandfather rights for chartering as such, and to a permit for such operations which would allow it to charter vessels for carriage of nonexempt as well as exempt cargo, without reference to its character in this respect; and (2), this being so, it was "engaged in transportation" of both exempt and nonexempt commodities on the critical date and therefore, under the Commission's rulings relating to such situations,

7 Section 302(e) in pertinent part is as follows:

"The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.'" 49 U. S. C. § 902(e).

was entitled to a permit authorizing not only chartering but also transportation of commodities generally.

Appellant relies especially upon the Commission's decision in *C. F. Harms Company, Contract Carrier Application*, 260 I. C. C. 171, rendered January 4, 1944, after the complaint had been filed in this case;⁸ with emphasis also upon *Russell Bros. Towing Case*, 250 I. C. C. 429, and *Moran Towing & Transportation Company Case*, 250 I. C. C. 541; 260 I. C. C. 269.

In these cases permits were granted either to a "furnisher of vessels" or to towers without limitation as to commodities on the basis of such a holding out, except that in the *Moran* case the tower had no official knowledge of the contents of the loaded barges. Appellant regards these decisions as inconsistent with the Commission's action in this case. The Commission distinguishes them, however, on the basis that the evidence disclosed operations affecting both exempt and nonexempt goods. The intervening protestants characterize appellant's "strategy," particularly in its reliance upon the *Russell Bros.* case, as follows: "It hopes first to have itself made subject to the act as a 'furnisher of vessels' and, having established that fingerhold, to bring to its aid the doctrine of the *Russell Bros. Case* that both regulated and unregulated activities should be considered in determining rights."

If the Commission's premise were valid, that a ~~furnisher of vessels~~ must show, as of the critical date, that his operations included nonexempt commodities or, as its opinion stated, "the nature of the services rendered; the commodities carried in, or the points served with such vessels," we would nevertheless be in doubt concerning the validity of its ruling that no sufficient showing was made in this case.

Appellant's exhibit disclosed 43 or 44 chartering operations in the period taken by the Commission as evidential, designated simply as "charter." All but two specified Cairo, Illinois, as both origin and destination. In the brief it is suggested these were therefore exempt under § 303(g) relating to transportation in a single harbor. The suggestion flies flatly in the face of the contradicted testimony given by Captain Barrett that Cairo

⁸ Three decisions were rendered in the *Harms* matter. The first gave authority to furnish vessels limited to scrap iron and to specified ports, 250 I. C. C. 513; the second removed the commodity limitation, 250 I. C. C. 685; the third, by the full Commission, removed the "territorial" limitation, 260 I. C. C. 171.

was designated in these instances because it was the situs of the fleet, appellant was chartering or leasing the equipment on a per diem basis, was therefore not interested in the contents or character of the cargo or where the vessel went, and that these operations were not confined to the Cairo harbor but that point was designated because it was the place where the movement began and the equipment was delivered when it ended. The effect of this evidence is not nullified, as seems to be suggested in the brief, because the witness also testified that the chartered vessels were run with appellant's crews, the masters were handed manifests disclosing the cargoes carried, and the trip sheets would reveal where the vessels went. Any other than the most rigid construction would regard these facts as supporting, rather than impairing, the claim of engaging in general chartering operations without limitation to exempt commodities or particular points of loading and unloading.

Similar restrictive inferences are drawn in the brief to support "probable exemptions" in nearly all the other instances of chartering, including six in 1937 as "too remote" though within the period considered. Of these some 19 or 20, relating to chartering to other carriers subject to regulation, seem justified. But with them eliminated, 23 instances of chartering to shippers who were not carriers remain to support the claim. We are unable to accept the view that they constituted so meager a showing as to justify on this ground withholding a permit for chartering.

In the *Moran* case the Commission said:

We think it unnecessary in this case to determine whether the services performed were or were not actually subject to the act. The nature of the cargo in the vessels towed is usually the determining factor as to whether or not the service is exempt, but applicant's towage service is performed without regard to the nature of the cargo loaded in the vessels towed by it. 260 I. C. C. 269, 272.

In the *Russell Bros.* case the Commission stated, with reference to the definition of a common carrier by water in Part III and the "grandfather" requirement of bona fide operation on the critical date:

It will be noted that in neither instance is there any reference to whether the transportation performed by the carrier is or is not subject to regulation. In determining a carrier's status and the scope of its operations during the "grand-

father" period, its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that "grandfather" rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires ~~the~~ reading into the law of language which, in fact, is not there. 250 I. C. C. 429, 433-434.⁹

Notwithstanding the Commission's insistence that these cases are distinguishable, as resting upon different showings, it is difficult to accept that view if as the *Moran* opinion indicates, the crucial fact to be shown is performance of service "without regard to the nature of the cargo loaded in the vessels towed by it." The conclusion is even more difficult if, as the *Russell Bros.* opinion states, "To find that 'grandfather' rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires reading into the law of language which, in fact, is not there."

This statement applies equally to the comparable statutory provisions relating to contract carriers. Cf. *C. F. Harris Co., Contract Carrier Application*, 250 I. C. C. 685; 260 I. C. C. 171. Section 309(f) does not in terms require that such a carrier, to be entitled to "grandfather" rights, must have been engaged in the transportation of commodities which are nonexempt. It may be conceded that such a limitation properly may be implied from the requirement of substantial parity between operations on the critical date and those for which a permit is sought, as to other forms of transportation than the furnishing of vessels as defined in § 302(e). Cf. *Alton R. Co. v. United States*, 315 U. S. 15, 22; *Noble v. United States*, 319 U. S. 88, 92. But it does not follow that the same limitation applies to "the furnishing for compensation (under charter, lease, or other agreement) of a vessel" under that section. It defines the act of furnishing, to shippers other than regulated carriers, as "engaging in transportation" within

⁹ The opinion continued: "This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities, or general cargo. Obviously no carrier actually transports all commodities, and therefore the bona fides of an applicant's operations depend on the representative character of the transportation performed. It may well be that the carrier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application; but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation, we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights predicated upon that view would be unjust and unreasonable, and is not contemplated by the law." 250 I. C. C. 429, 434.

the meaning of "contract carrier by water" as that term is used in the section. If the purpose was to treat this form of water operation identically with others covered by the general definition, the purpose and utility of the special provision concerning furnishing become obscure if the provision does not in fact become wholly ineffective.

The chartering or leasing of vessels and equipment is not so obviously similar to or identical with actively "engaging in transportation" that, without specific provision for coverage, it necessarily would be included within that of the more general definitions and provisions. Quite different modes of operation, physically and in business management, as well as responsibilities, conceivably if not also generally, give the activity materially different characteristics from the carrying of goods in the more conventional sense. Congress obviously sought to bring these operations within the regulatory scheme by the special provisions.

In doing so we do not think it had in mind the purpose to draw a sharp line between ~~charterers~~ carrying only exempt commodities and those carrying nonexempt ones. That is true, notwithstanding the fact that one engaging in chartering affecting only the former is no more required to secure a permit than one engaging in other forms of transporting exempt commodities.

The legislative history shows that the original counterpart of the "furnishing" provision of § 302 (e) extended to the furnishing of a vessel "to another person" rather than "to a person other than a carrier subject to this Act" as it now stands. This met with vigorous opposition on the ground that an owner supplying equipment to another carrier would become subject to the Act; thus possibly imposing upon him responsibility for the charges of the lessee, or other person performing the operation, for performing it and for those operations, over which of course the ~~charterer~~ would not have control. It was feared this might destroy a large amount of chartering activity, including both inter-coastal and inland waterway business, conducted then with a high degree of flexibility. Cf. 84 Cong. Rec. 9709; id. 9979. Emphasis was placed in the discussion upon the freedom of railroads acting under Part I, and of motor carriers, under Part II, to lease surplus equipment without becoming responsible as regulated carriers for its use; and upon the common practice of barge lines and other water carriers to lease equipment freely and for long or short periods of time on open markets. *Ibid.*

furnishers of vessels

owner

To meet the objections an amendment was offered in the House to make the original proposal read: "... a person which furnishes a vessel ... shall itself not be considered to be engaged. ...". 84 Cong. Rec. 9979. Had this finally been adopted, chartering would have been wholly exempt. The final form of the bill struck out the word "not" and substituted the present provision. The Conference Report states, in addition to the purpose to limit application to cases where the vessel is furnished to a person other than a regulated carrier, the intention to clarify the language "to make sure that the person furnishing the vessel will not simply by reason of furnishing the vessel, become a contract carrier subject to part III of the act as to that part of its business not related to the furnishing and use of the vessel." (Emphasis added)

This seems obviously to contemplate that chartering or the defined furnishing of equipment is to be regarded and treated as in a separate category from other forms of chartering in regulated activity; and that the one furnishing the vessel by that act would become a "contract carrier subject to part III" as to that part of the business, unless the vessel were furnished to another carrier. This conclusion is further supported by the fact that § 802 (e) in terms takes account of the character of the property to be so transported in the language "to be used by the person to whom such vessel is furnished in the transportation of its own property."

This limitation takes no account of the distinction between exempt and nonexempt commodities. Had Congress intended that line to be drawn rigidly to require showing of chartering for carriage of nonexempt goods in order to establish grandfather rights, that purpose, we think, would have been clearly expressed. Its concern in this provision was not with that line. The obvious purpose was to secure full regulation of the traffic by application of the Act's provisions to the lessee, if he should be a regulated carrier, thus exempting the lessor in that situation otherwise to the lessor.

In providing for the alternative incidence of coverage Congress recognized that in chartering the character of the commodity as being exempt or not exempt was more the concern of the lessee than of the lessor or charterer. The latter's concern was with the furnishing of the vessel as such and with whether

the "lessee" was a regulated carrier. To regard the Act as imposing the further limitation that the ~~charterer~~ also must have regard to the character of the cargo would cast that activity, intended to be kept flexible, as the legislative history shows, into a more rigid regulatory mold than other forms of transportation covered either by Part III or by Parts I and II.

Accordingly we think the Commission erred in concluding that appellant was not engaged in chartering operations subject to Part III on the critical date, for failure to show "the nature of the services rendered, the commodities carried in, or the points served with such vessels." This conclusion, moreover, seems to be in accord with its own decision in the *Harms* case and in harmony with the principles followed in the *Moran Towing* case and that of *Russell Bros.*¹¹

The Commission urges however that we are not concerned simply with inconsistencies in its decisions, since evidence varies with cases and to its informed judgment is confided the primary duty to make appropriate applications of the Act. We respect that judgment and that obligation. But the matter now involved goes beyond mere apparent inconsistency in the statute's application. Seemingly there has been a basic difference of opinion within the Commission itself concerning the necessity for proof showing the character of the commodity, as exempt or nonexempt, to establish grandfather rights to chartering operations and also as to the character of the proof required. This appears from the fact that two of the three Commissioners who participated in the decision by Division IV in this case dissented from the full Commission's decision in the *Harms* case and one of them in the *Moran* case.

With full respect for the dissenting judgment, we think the view eventually reached by the majority in those decisions accords with the statutory purpose and provision.¹² The dissenting Commis-

¹¹ See, however, *W-764, Upper Mississippi Towing Corp., Common Carrier Applications*, decided May 3, 1944.

¹² It is suggested by the protesting intervenors, that appellant has failed to exhaust its administrative remedy by neglecting to apply a second time for reconsideration by the Commission after the final *Harms* decision, cf. note 8, although it was rendered after the complaint was filed in this case. The suggestion, if followed generally, conceivably could result in keeping applicants running back and forth between court and commission, if not indeterminably, then to an extent certainly not contemplated by the exhaustion doctrine. Appellant fulfilled the requirements of that doctrine by its application for reconsideration made to the entire Commission and its denial of the petition.

signers emphasize the requirement of § 309(g) that a permit shall specify the business of the contract carrier and the scope thereof; and regard this as qualifying the "furnishing" provision of § 302(e) so as to require substantially the same specific showing as to character of the commodities and territorial scope of operations in chartering as has been deemed required for other forms of transportation. Without this, they say, the substantial parity between future operations and prior bona fide operations contemplated by the grandfather provisions cannot be maintained.

The policy of maintaining that parity by adequate standards of proof is sound, although "the Act is remedial and to be construed liberally." *McDonald v. Thompson*, 305 U. S. 263, 266; *Crescent Express Lines, Inc. v. United States*, 320 U. S. 401, 409. The policy, however, may be defeated by too strict an application in particular cases, more especially it would seem in relation to water carriers whose operations, in contract carriage at any rate, are more generally irregular and spasmodic than in the case of other carriers. The Court has said, even in relation to the latter: "The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial." *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 483, 484.

This language has particularly appropriate application to the proof made in this case, at any rate in relation to the chartering operations, in so far as proof may be required for compliance with the requirements of § 309(g). Beyond this, it bears also upon the extent to which these requirements are to be taken as qualifying § 302(e). To consider them as doing so in a manner to require the chartering carrier to prove specific instances of nonexempt commodity carriage would molecularize, if not atomize, the chartering business and threaten, if not accomplish, the destruction anticipated in the congressional debates. That result, or one tending strongly toward it, as would such a construction, hardly can be taken to be consistent with the de-

clared national transportation policy "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each" or the further declaration that this policy is to be applied in enforcing *all* of the Act's provisions.¹³ Spasmodic operation hardly would be regarded as an inherent advantage of rail or perhaps of motor service in general. It is, or may be, the most valuable inherent advantage of a contract water carrier.

It follows that the judgment must be reversed as to the chartering phase of appellant's operations.

In view of what has been said, particularly with reference to the varied and spasmodic character of appellant's operations, and the policy of maintaining these as an inherent advantage of water transportation, our judgment might differ from the Commission's as to the sufficiency of the showing made as it related to other operations than chartering and, in view of that showing, as to the necessity or propriety of limiting the period of operations considered, in relation to the claim of grandfather rights, to that following January 1, 1936.

Nevertheless, our views in these respects are not to be substituted for the Commission's which is not only specially informed but broadly discretionary and controlling except in case of clear departure from statutory requirements. Apart from the chartering, we are unable to say there was such a departure in this case. The policy of the Commission has recognized that a somewhat more liberal attitude is required in the case of water carriers than with respect to others in the length of the period to be considered as establishing the claim of bona fide operation.¹⁴ Moreover, as has been stated, the evidence relating to the latter part of the period prior to 1936 was rather more vague than that affecting both earlier and later periods. In view of these facts we cannot say that the Commission erred in its findings or conclusion that

¹³ Cf. Oppenheim, *The National Transportation Policy and Inter-Carrier Competitive Rates* (1945) 27 ff.

¹⁴ Compare *Moran Towing & Transp. Co., Inc., Applications*, 260 I. C. C. 269, 273; *Thames River Line, Inc., Common Carrier Application*, 250 I. C. C. 245; and other cases in the latter volume at pp. 106, 117, 179, 353, 370 and 599, with, e. g., *Jack Cole Co. v. United States*, 41 M. C. C. 657, 59 F. Supp. 10, affirmed per curiam, 324 U. S. —; *Gregg Cartage Co. v. United States*, 316 U. S. 74.

appellant was not entitled, on the showing made, to a permit for grandfather operations other than those involving chartering.

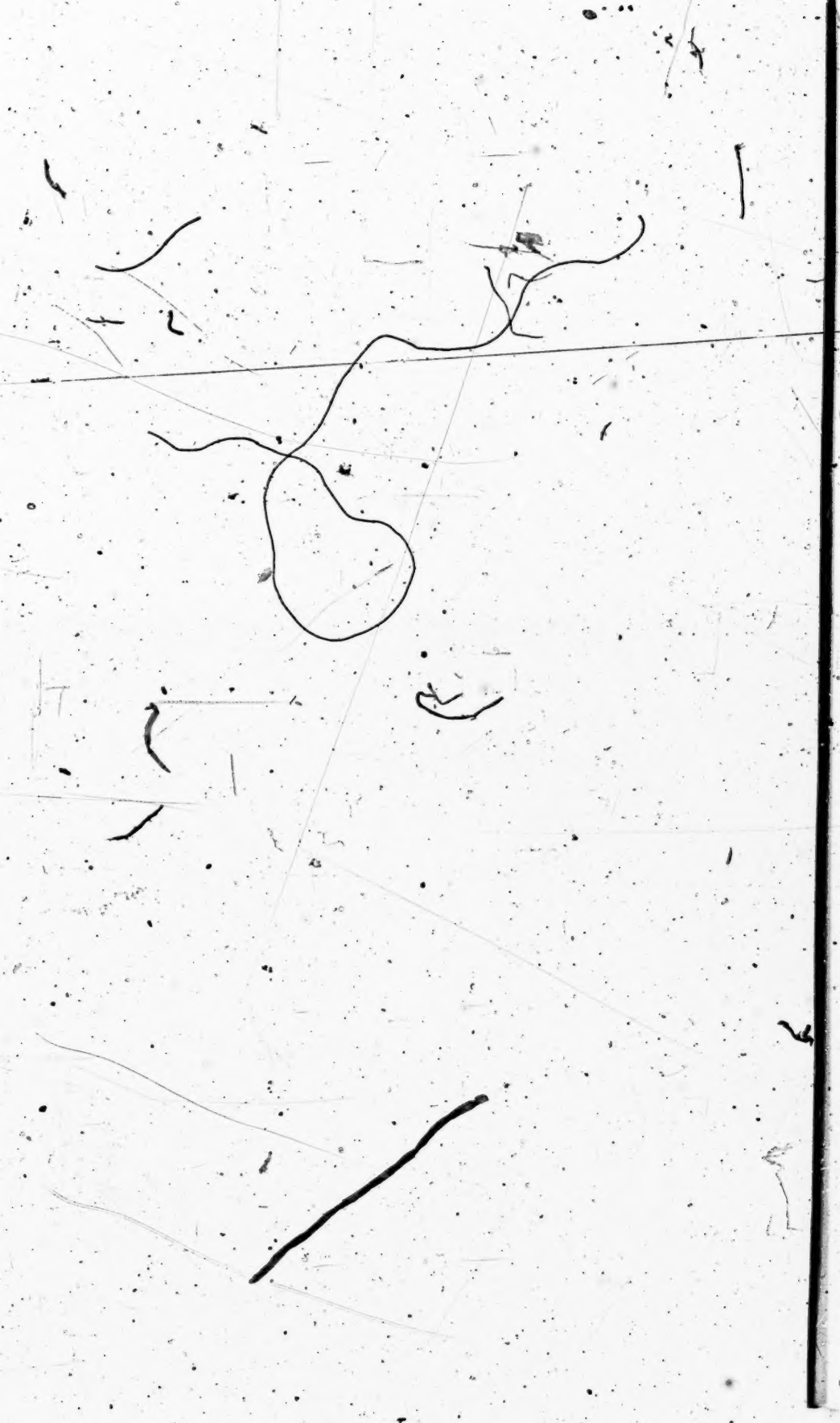
In this phase of the case it is necessary only to add that in view of the specific statement contained in the Conference Report quoted above,¹⁵ appellant is not entitled to found grandfather rights to transportation other than chartering upon a showing only of chartering operations.

We think too that it would be an invasion of the province of the Commission for us to interfere with its action in finding that appellant upon the showing it made was not, at the time of the application, entitled to a permit for a new operation. It is true that its confinement, since about 1940, to operations substantially, if not exclusively, in transportation of petroleum products has been induced, according to the proof, by the war emergency; and that this business in all probability will terminate with the emergency's end. It is likewise true that appellant's equipment can be converted readily for other uses when that occurs and, unless authority is obtained to conduct operations upon a scale sufficient to enable appellant to employ it profitably, the business may be forced to close or required to operate uneconomically. Nevertheless, in view of the failure to make specific showing of some immediate prospect of entering upon new and nonexempt operations, and of the range and weight of the Commission's discretion in relation to such applications, we are not at liberty to interfere with its action.

The Commission has suggested, in the brief, that upon another application, accompanied by a sufficient showing of intended "new operations," the desired permit may be granted. No doubt, in such an event, the application will be considered in the light of the Act's injunction of "fair and impartial regulation" so administered as to recognize and preserve the inherent "advantages" of the type of transportation in which the Barrett Line has been engaged through four generations of river life.

The judgment is affirmed as to operations other than chartering; as to them, it is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

¹⁵ Cf. text at note 10.



SUPREME COURT OF THE UNITED STATES.

No. 630.—OCTOBER TERM, 1944.

The Barrett Line, Inc., Appellant,

vs.

The United States of America, Interstate Commerce Commission and Mississippi Valley Barge Line Co., et al..

Appeal from the District Court of the United States for the Southern District of Ohio.

[June 18, 1945.]

The CHIEF JUSTICE, Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice JACKSON, dissenting.

The Court, in rejecting the refusal of the Interstate Commerce Commission to grant a permit as a contract carrier by water for charter purposes, is greatly influenced by an alleged conflict in the Commission's determinations. Compare *C. F. Harms Co., Contract Carrier Application*, 260 I. C. C. 171; *Russell Bros. Towing Co., Inc., Common Carrier Application*, 250 I. C. C. 429; *Moran Towing & Transportation Co., Inc., Applications*, 260 I. C. C. 269, with *Upper Mississippi Towing Corp., Com. Car. Applications*, 260 I. C. C. 292. Assuming such a conflict, it is our business to deal with the case now here and not to be concerned with apparent inconsistencies in administrative determinations. If the Commission has kept within the bounds of the statute in this case, its order should be sustained. We think that the interpretation of § 302(e) made by the Commission was proper. Certainly, the construction of this provision involves considerations so bound up with the technical subject matter that, even though the neutral language of the statute permits, as a matter of English, the construction which the Court now makes, the experience of the Commission should prevail. Compare *Gray v. Powell*, 314 U. S. 402.